No. 16-529

IN THE
Supreme Court of the United States

CHARLES R. KOKESH,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CLINTON W. MARRS
MARRS GRIEBEL LAW, LTD.
1000 Gold Ave, SW
Albuquerque, NM 87102
(505) 433-3926
clinton@marrslegal.com

ADAM G. UNIKOWSKY
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

The Government agrees with Petitioner that the petition for a writ of certiorari should be granted. This Court has frequently granted certiorari in cases where the federal government, as respondent, has supported a grant of certiorari. *See, e.g.*, *Mathis v. United States*, No. 15-6092, 136 S. Ct. 894 (2016); *Bruce v. Samuels*, No. 14-844, 135 S. Ct. 2833 (2015); *Menominee Indian Tribe of Wisconsin v. United States*, No. 14-510, 135 S. Ct. 2927 (2015); *Mach Mining, LLC v. EEOC*, No. 13-1019, 134 S. Ct. 2872 (2014). Moreover, Petitioner has not located any case in which the Court has denied a petition for a writ of certiorari when the federal government, as respondent, has supported a grant. Accordingly, the Court should grant certiorari in this case.

Petitioner will respond briefly to the Government's equally brief discussion of the merits. First, disgorgement is a "penalty." It is a legal obligation to pay money to the government, imposed as a consequence of wrongdoing—a classic form of punishment. The Government analogizes this case to *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), Gov't Br. 8, but those cases are very different. In *Porter*, a landlord was directed to return excess rents *to the tenants who paid them*. 328 U.S. at 402. The Court emphasized that the court was not ordering the landlord to pay "penalties which go to the United States Treasury" but was instead "ordering the return of that which rightfully belongs to the purchaser or tenant." *Id.* Similarly, in *Sheldon*, a copyright infringer was directed to pay profits from the

infringement *to the copyright owner*. 309 U.S. at 400-01. In those cases, the restitution order had the remedial effect of restoring property to its rightful owner. Here, by contrast, Petitioner was ordered to pay a money judgment to the government as a consequence of wrongdoing.

Second, disgorgement is a "forfeiture." The Government's brief discussion takes contradictory positions. It first argues that the term "forfeiture" refers to "something imposed in a punitive way." Gov't Br. 8 (citation omitted). But it then argues that the term "forfeiture" refers to *in rem* forfeitures which were imposed "without regard to the culpability of the property's owner," Gov't Br. 8-9—an apparent acknowledgement that "forfeiture" encompasses remedies that are *not* punitive, because the very definition of a punitive remedy is a remedy imposed as a consequence of culpability. Rather than impose artificial and contradictory limits on the term "forfeiture," the Court should hold that the disgorgement order here was a "forfeiture" under the ordinary meaning of that term.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CLINTON W. MARRS
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clinton@marrslegal.com

ADAM G. UNIKOWSKY
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